STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED October 19, 2001
v	No. 217294 Macomb Circuit Court
PAUL DAVID TURNER, Defendant-Appellant.	LC No. 97-000912-FC

Before: Hoekstra, P.J., and Talbot and Zahra, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of two counts of being an accessory after the fact to murder, MCL 750.505, and two counts of possession of a firearm during the commission of a felony ("felony-firearm"), MCL 750.227b. The trial court sentenced defendant to two concurrent terms of forty months to sixty months' imprisonment for the accessory convictions to be served consecutively to two concurrent terms of two years' imprisonment for the felony-firearm convictions. Defendant appeals as of right. We affirm.

I

Defendant first argues that the trial court erred in denying his motion to suppress the murder weapon seized from his residence. We review a trial court's factual findings on a motion to suppress for clear error. *People v Echavarria*, 233 Mich App 356, 366; 592 NW2d 737 (1999). Clear error exists where this Court is left with the definite and firm conviction that a mistake has been made. *People v Parker*, 230 Mich App 337, 339; 584 NW2d 336 (1998).

Both the United States and the Michigan Constitution prohibit unreasonable searches and seizures. US Const, Am IV; Const 1963, art 1, § 11. In order for a defendant to attack the propriety of a search and seizure, he must have standing to challenge the search. *Parker*, *supra* at 339. In determining whether standing exists, "the trial court must decide, upon consideration of the totality of the circumstances, whether the defendant had an expectation of privacy in the object of the search and seizure and whether that expectation is one that society is prepared to recognize as reasonable." *Id.* at 340. It is defendant's burden to establish standing. *People v Powell*, 235 Mich App 557, 561; 599 NW2d 499 (1999).

Here, evidence was adduced during the hearing that defendant no longer lived at the residence where the murder weapon was located. Defendant had previously given the residence address to Clinton Township police in September 1996. When he was interrogated in October 1996, however, he indicated that he no longer lived at that residence. The search of the residence and seizure of the evidence was subsequent to that interrogation. Because defendant did not live at the residence at the time of the search, he had no expectation of privacy in the house and, thus, no standing to challenge the search and seizure.

Even if defendant had standing to challenge the search of the premises, the search was reasonable under the circumstances. Generally, a search conducted without a warrant is unreasonable unless there exists both probable cause and an established exception to the warrant requirement. *In re Forfeiture of $176,598*, 443 Mich 261, 265-266; 505 NW2d 201 (1993); *People v Jordan*, 187 Mich App 582, 586; 468 NW2d 294 (1991). Probable cause to search exists when, upon consideration of the totality of the circumstances, the facts and circumstances warrant a reasonably prudent person to believe that a crime has been committed and that the evidence sought will be found in a stated place. *People v Russo*, 439 Mich 584, 606-607; 487 NW2d 698 (1992); *People v Williams*, 160 Mich App 656, 660; 408 NW2d 415 (1987). "Whether probable cause exists depends on the information known to the officers at the time of the search." *Jordan, supra* at 586-587.

Of relevance to facts of this case, the exigent circumstances exception allows the police to enter and search the premises, without a warrant, where they have probable cause to believe that a crime was recently committed on the premises and that evidence or perpetrators of the suspected crime are contained on the premises. *In re Forfeiture, supra* at 271. The police must "establish the existence of an actual emergency on the basis of specific and objective facts indicating that immediate action is necessary to (1) prevent the imminent destruction of evidence, (2) protect the police officers or others, or (3) prevent the escape of a suspect." *Id.* The officers' actions must be objectively reasonable in light of all the facts confronting them on the scene. *Jordan, supra* at 587. *Graham v Connor*, 490 US 386, 396-397; 109 S Ct 1865; 104 L Ed 2d 443 (1989).

In the present case, the police received information that, at some point, defendant lived at the residence. They originally went to the residence in hopes of locating the getaway car. While driving by the residence, the police observed that the outer door to an enclosed porch area was partially open, the hasp and padlock to the door were broken, the screws for the lock had been pulled out of the wood trim of the door, and the inner door inside the porch area did not have a lock. One of the officers recalled being called to that same residence in the past by a woman in her fifties. The police observed someone in the house, lying on a couch. The police then called for backup. While waiting for backup to arrive, an electric-company employee arrived at the house and turned on the electricity, which led the officers to believe that the house should have been unoccupied. On the basis of these facts, the police believed that someone had broken into the house and was using it as a place to stay. Considering the totality of the circumstances, these facts sufficiently show that the police had probable cause to reasonably believe that a crime was in progress, that the premises contained evidence, and that a perpetrator of the suspected crime was still inside the house.

The same facts that establish probable cause also constitute specific and objective facts indicating the existence of an actual emergency. Again, the police believed that a break-in was in progress in an unoccupied home, and that the suspect was still inside. They were justified in entering the house immediately to assess the situation and secure the premises in order to prevent potential destruction of evidence, injury to other persons, or escape of the suspect. See *In re Forfeiture, supra*, and *Williams, supra* at 660-661. Accordingly, the trial court did not err by denying defendant's motion to suppress the murder weapon because the entry into the residence was reasonable.[1]

II

Defendant, who is white, next argues that he was denied his constitutional right to an impartial jury when the prosecutor used peremptory challenges in a discriminatory manner to strike black jurors in violation of *Batson v Kentucky*, 476 US 79; 106 S Ct 1712; 90 L Ed 2d 69 (1986). This Court reviews a trial court's ruling regarding a *Batson* challenge for an abuse of discretion. *Harville v State Plumbing & Heating, Inc*, 218 Mich App 302, 320; 553 NW2d 377 (1996). This Court gives great deference to the trial court's findings "because they turn in large part on credibility." *Id*. at 319-320.

In *Batson*, the United States Supreme Court held that the Equal Protection Clause prohibits a prosecutor from using peremptory challenges to strike black jurors from a black defendant's jury simply because the jurors are black. However, a criminal defendant may object to race-based exclusions of jurors effected through peremptory challenges whether or not the defendant and excluded jurors share the same race. See *Powers v Ohio*, 499 US 400; 111 S Ct 1364; 113 L Ed 2d 411 (1991). The burden initially is on the defendant to make out a prima facie case of purposeful discrimination. *Batson, supra* at 93-94; *People v Barker*, 179 Mich App 702, 705; 446 NW2d 549 (1989). In deciding whether the defendant has made a requisite showing of purposeful discrimination, a court must consider all relevant circumstances, such as whether there is a pattern of strikes against black jurors, and the questions and statements made by the prosecutor during voir dire and in exercising his challenges. *Batson, supra* at 96-97. If a defendant makes such a prima facie showing of a discriminatory purpose, the burden shifts to the prosecutor, who must articulate a racially neutral explanation for challenging black jurors. *Id.* at 97-98. The trial court must then determine if the defendant has established "purposeful discrimination." *Id*.

Here, defendant failed to establish purposeful discrimination. Defendant essentially argues that the two black jurors removed by peremptory challenge were two of only three black individuals in the jury venire and, thus, the prosecutor's removal of the second black juror after removing the first black juror shows a pattern of discrimination. The mere fact, however, that a party uses one or more peremptory challenges in an attempt to excuse minority members from a jury venire is insufficient to establish a prima facie showing of discrimination. *Clarke v Kmart*

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[1] Because defendant does not challenge the propriety of the subsequent seizure of the gun, that issue is waived on appeal. See *In re Subpoena Duces Tecum to the Wayne Co Pros (On Remand)*, 205 Mich App 700, 704; 518 NW2d 522 (1994).

Corp, 220 Mich App 381, 383; 559 NW2d 377 (1996); *People v Williams*, 174 Mich App 132, 137; 435 NW2d 469 (1989). Moreover, after the second black juror was dismissed, another black juror remained on the jury.

Moreover, even assuming that defendant established purposeful discrimination, we give deference to the trial court's findings that the prosecutor provided a race-neutral reason for moving to excuse the second black juror.[2] Here, the court found that the prosecutor's concern that the second black juror was inattentive and falling asleep was a sufficient race-neutral reason. Unless a discriminatory intent is inherent in the reason offered, which does not have to be persuasive or even plausible, the reason will be deemed race-neutral. *Purkett v Elem*, 514 US 765, 767-768; 115 S Ct 1769; 131 L Ed 2d 834 (1995). Further, it was reasonable for the prosecutor to attempt to achieve a jury that would be alert and interested in the facts and proceedings of the case. Accordingly, defendant is not entitled to any relief on this basis.

III

Defendant also argues that the trial court denied him a fair trial because its instruction to the jury in response to a question was insufficient and unresponsive. We disagree. "A court must properly instruct the jury so that it may correctly and intelligently decide the case." *People v Clark*, 453 Mich 572, 583; 556 NW2d 820 (1996); *People v Crawford*, 232 Mich App 608, 619; 591 NW2d 669 (1998). We review jury instructions in their entirety to determine if there is error requiring reversal. *People v Daniel*, 207 Mich App 47, 53; 523 NW2d 830 (1994). Even if imperfect, instructions do not create error if they fairly present to the jury the issues for trial and sufficiently protect the defendant's rights. *People v Piper*, 223 Mich App 642, 648; 567 NW2d 483 (1997).

Here, the jury asked: "[a]ccording to law if [defendant] had info about the crime [and] didn't take it to the police does he become an accessory after the fact since he witnessed the crime." In response to this inquiry, the trial court reread the instructions for accessory after the fact and mere presence. Contrary to defendant's claim, there is no indication that the court's response was insufficient or improper, or denied him a fair trial. Moreover, it is the jury's responsibility to determine the facts and apply them to the law, and a trial court's instruction must not improperly invade the province of the jury. See *People v Gaydosh*, 203 Mich App 235, 237-238; 512 NW2d 65 (1994).

IV

Finally, defendant argues that the trial court abused its discretion in admitting photographic evidence of the victims and the crime scene. We review a trial court's decision to admit photographic evidence for an abuse discretion. *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995), modified on other grounds 450 Mich 1212 (1995); *People v Ho*, 231 Mich App 178, 187; 585 NW2d 357 (1998). An abuse of discretion is found only if an unprejudiced

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[2] We note that defendant did not object to the removal of the first black juror by peremptory challenge, after the prosecution proffered its race-neutral reason.

person, considering the facts on which the trial court acted, would say there was no justification or excuse for the ruling made. *People v Rice (On Remand)*, 235 Mich App 429, 439; 597 NW2d 843 (1999).

Photographs that are calculated solely to arouse the sympathies or prejudices of the jury may not be admitted. *People v Howard*, 226 Mich App 528, 549; 575 NW2d 16 (1997). The question is whether photographs are relevant under MRE 401 and, if so, whether their probative value is substantially outweighed by the danger of unfair prejudice under MRE 403. *Mills*, *supra* at 66-67. Here, the photographs were relevant to show the crime scene and that the two people were murdered, as well as being instructive in depicting the location, nature and extent of the victims' injuries. *People v Williams*, 422 Mich 381, 392; 373 NW2d 567 (1985); *People v Flowers*, 222 Mich App 732, 736; 565 NW2d 12 (1997). Contrary to defendant's suggestion, the mere fact that he did not dispute that the victims were murdered does not render the photographs inadmissible. See *People v Schmitz*, 231 Mich App 521, 534; 586 NW2d 766 (1998). Moreover, relevant photographs are not rendered unfairly prejudicial merely because they are gruesome, vivid or shocking. *Mills*, *supra* at 76; *Howard*, *supra* at 549-550. Accordingly, the trial court did not abuse its discretion in admitting the photographic evidence.

Affirmed.

/s/ Joel P. Hoekstra
/s/ Michael J. Talbot
/s/ Brian K. Zahra